No. 646

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOHN J. MOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court's Findings of Fact and Conclusions of Law (R. 11–14) are not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 2–6) is reported at 247 F. 2d 623.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1957 (Pet. App. 6). Petitioner's timely motion for rehearing was denied on September 11, 1957 (R. 62). The petition for certiorari was filed on December 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below erred in making the following three findings of fact, any one of which would bar petitioner's claim:

(a) That there was no contract in fact—unilateral or otherwise—between petitioner and the Government for the forwarding of freight during the period in question;

(b) That in any event the Government officers involved had no authority to contract on behalf of the Government;

(c) That the reasonable value of petitioner's services to the Government was the amount of the check sent to and retained by petitioner.

2. Whether the Tucker Act, 28 U. S. C. 1346 (a), confers jurisdiction on the district courts to render a judgment against the Government on the basis of a contract implied in law.

STATUTE INVOLVED

28 U. S. C. 1346 (a) provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT

Petitioner filed his complaint in the District Court for the Southern District of California invoking the jurisdiction of that court under the Tucker Act, 28 U. S. C. 1346 (a) (R. 3). The complaint recited three counts: the first count alleged breach of a written contract (R. 4); the second, breach of an oral contract (R. 5); the third, breach of a contract implied in law, for which recovery was sought on a *quantum meruit* basis for services rendered (R. 6).

The facts as developed at trial may be summarized as follows:

Petitioner is a freight forwarder at Los Angeles who, prior to the events giving rise to the instant litigation, held a one-year written contract with the General Services Administration (G. S. A.) to serve as its forwarding agent for Government freight bound into the Pacific (Pet. App. 2). The contract fee for this service was six and one-half cents per ton with a minimum of $7.50 per shipment (R. 22, 28). This contract expired by its own terms on June 30, 1951 (Pet. App. 2; R. 40). During this period, freight forwarders received their entire commission from the shipper (R. 22).

At the time this contract expired, in June 1951, the Pacific Westbound Conference, an association of West Coast carriers, initiated the practice of allowing their carriers themselves to pay brokerage fees to freight forwarders such as petitioner (Pet. App. 2). Upon the shipper's filing with the Conference a formal designation of the particular forwarder as the shipper's forwarder, the forwarder was paid by the carrier a

brokerage fee of one and one-fourth per cent of the shipping charges (Pet. App. 2; R. 23, 25).

With the institution of this new arrangement, G. S. A. desired to eliminate its direct brokerage fees to the forwarder, since forwarders were now receiving commissions from the carriers; but the Government was not prepared to meet all the requirements of the Conference which had to be satisfied before the forwarder could collect his brokerage from the carrier. Under the rules of the Conference, the selection of the carrier was to be made by the forwarder (Pet. App. 3). G. S. A., however, took the position that it must retain the right to select its carriers (Pet. App. 3), and therefore refused to designate petitioner as its shipping agent. As a result, petitioner could not collect its brokerage from the carriers on Government freight.

However, petitioner continued to perform certain forwarding services with the knowledge and consent of Government officials (R. 12). The Government continued to make its own bookings, but petitioner handled the other details of forwarding, including confirmation of the booking and preparation of the bills of lading and other documents (R. 29, 20). It is admitted that no new formal contract was entered into between petitioner and G. S. A. (Pet. 4), although there was considerable correspondence between the parties.[1]

Finally, in August 1954, G. S. A. worked out an agreement with the Conference whereby the Govern-

[1] This correspondence, exhibits in the courts below, has not been certified by petitioner as part of the record in this court.

ment would make the initial booking in Washington, tentatively reserving the space, while the forwarder would make the confirmation booking in Los Angeles when it received shipping instructions (Pet. App. 3; R. 29). Once these arrangements were completed, petitioner was formally certified with the Conference by G. S. A. as its freight forwarder (Pet. App. 3) and, since August 1954, petitioner has been receiving its compensation wholly from the carriers at the rate of one and one-fourth percent of the shipping charges (Pet. App. 3). The Government has accordingly paid no brokerage fee directly.

The instant litigation arises over petitioner's compensation for his services during the period from June 30, 1951, when his contract expired, until August 1954, when arrangements were made between G. S. A. and the Pacific Westbound Conference under which G. S. A. certified petitioner as its freight forwarder.

The General Accounting Office sent to petitioner a check for $1,881.10, which it determined to be the reasonable value of his services. The basis for this determination was the Government's contract with petitioner which expired on June 30, 1951, and called for a brokerage fee of six and one-half cents a ton with a minimum of $7.50 per shipment (Pet. App. 3; R. 22, 28). Petitioner retained the check without cashing it, claiming that the reasonable value of his services should be determined by reference to the one and one-fourth percent of the shipping charges he would have received from the carriers had G. S. A. certified him as its shipping agent earlier (Pet. App. 3-4). On this basis, petitioner would be entitled to

$8,305.00 (Pet. App. 3–4). Upon the General Accounting Office's denial of his claim for this amount, petitioner instituted this suit.

The District Court, after examining the exhibits and the testimony, concluded as a matter of fact that no contract covering the period in question had been entered into between petitioner and the Government (R. 12), and that the reasonable value of petitioner's services to the Government was $1,881.10 (R. 13), the amount of the Government check which petitioner had in his possession. Accordingly, judgment was entered for the Government (R. 14).

On appeal, the Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's finding of reasonable value, as well as the finding of no contract (Pet. App. 4–5). It specifically rejected petitioner's theory, urged in his present petition, that a unilateral contract had been consummated (Pet. App. 4). In addition, the Court of Appeals held that, even if a contract could be found, there was no showing that the contractual act was undertaken by an officer authorized to contract on behalf of the United States (Pet. App. 5).[2]

ARGUMENT

In his petition, petitioner contends: (a) that the evidence established a unilateral contract presumably consisting of a Governmental offer accepted by petitioner's act (Pet. 9); (b) that the Government officials who made this unilateral offer had authority to do so (Pet. 10–11); and (c) that the reasonable value of the

[2] The Government's exhibits, in the court's view, established that the officers involved had no such authority.

services rendered was $8,305.00, rather than $1,881.10 (Pet. 7–8). It appears that petitioner bases his third contention on alternative theories: first, that the alleged unilateral contract did not contain a price term and that therefore the contemplated contract price was the reasonable value of his services; second, that he may recover (irrespective of the existence or nonexistence of the alleged unilateral contract) the reasonable value of his services on the basis of a contract implied in law.

1. In order to prevail on the theory that the Government is liable for $8,305.00 for breach of a unilateral contract, petitioner must overturn three findings of fact, two of which were decided adversely to him by both courts below, and the third of which was decided adversely to him by the Court of Appeals.

Both the District Court (R. 12) and the Court of Appeals (Pet. App. 4) concluded that the evidence did not establish any actual contract—written or oral, bilateral or unilateral. In addition, both the District Court (R. 13) and the Court of Appeals (Pet. App. 5–6) found that the reasonable value of petitioner's services were $1,881.10. Finally, petitioner must also overturn the Court of Appeals finding that, even if the papers evidenced an actual contract, the commitment on the Government's behalf was not made by an authorized officer. See *Whiteside* v. *United States*, 93 U. S. 247; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380.

Thus, on this theory of the case, petitioner presents to the Court only three factual issues which have no application other than to the instant litigation. No

question of general importance is presented by the petition. As to the findings of fact on which both courts below passed, the familiar two-court rule making such findings well-nigh conclusive in this Court is clearly applicable. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Corn Products Refining Co.* v. *Commissioner of Internal Revenue*, 350 U. S. 46, 51. An affirmance on either of these findings would bar petitioner's claim. Further review in these circumstances is not merited.[3]

2. Although the suggestion is not made explicit, it appears that petitioner's argument as to the reasonable value of his services assumes, at least as an alternative theory, that the federal courts have jurisdiction under the Tucker Act to award a judgment against

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[3] We do not deem it necessary to discuss the merits of petitioner's factual contentions that the evidence established (1) a unilateral contract (2) entered into by an authorized officer, in view of the fact that the evidence relating to these issues has not been made a part of the record in this Court.

As to petitioner's contention that the reasonable value of his services was $8305.00 rather than $1881.10, we entirely agree with the Court of Appeals' observation (Pet. App. 5) that the reasonable value of petitioner's services *to the Government* cannot be measured by what a third party (the carrier) would have paid to petitioner if, in addition to performing the forwarding services, the forwarder booked the shipment with the particular carrier paying the fee. The only other evidence of the value of these services was the earlier forwarding contract between the Government and petitioner for the same services. Moreover, the fee paid by the carrier, which petitioner contends should determine the reasonable value of his services, was in no way related to the shipping fee which the Government paid to the shipper. Finally, the Government did its own booking during this period, a service performed by the forwarder under the arrangement whereby the forwarder received his fee from the carrier.

the United States on the basis of a contract implied in law, *i. e.*, a judgment in quasi-contract for the reasonable value of services rendered. This of course is not the case.[4] It is well settled that "[t]he Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law". *Merritt* v. *United States*, 267 U. S. 338, 341. See also *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287, 293; *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217; *Sutton* v. *United States*, 256 U. S. 575, 581.

In any event, even assuming that there were the requisite jurisdiction, the courts below found as a fact (see *supra*, p. 8) that the reasonable value of petitioner's services was $1,881.10, the amount of the check retained by petitioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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[4] Although the Government alluded to this jurisdictional objection in its brief in the Court of Appeals, it was not pressed. See Pet. App. 6. However, it is of course appropriate to call the Court's attention to any defect in jurisdiction at any stage in the proceeding.